IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-5992

FRANK O'NEAL ADDINGTON,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

BRIEF FOR THE APPELLEE

JAMES F. HURY, JR.
Criminal District Attorney
Galveston County Courthouse
Galveston, Texas 77550

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-5992

FRANK O'NEAL ADDINGTON,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

On July 2, 1969, the first of eleven applications for hospitalization was filed against Appellant, ten of which resulted in commitments.[1] (D.S. August 12, 1969, see Ap;

[1]Pursuant to the Revised Rules of the United States Supreme Court Rule 36(2), Appellee is permitted to make reference to parts of the record not contained in the Appendix filed with the Court by Appellant. Appellee makes references to certain docket sheet entries and applications for hospitalization and the supporting certificates of Medical Examinations for Mental Illness throughout the statement of the case. Docket sheet entries with dates of entry and supporting application for hospitalization will hereinafter be referred to in this matter (D.S. with date Ap). Docket sheet entries with dates of entry and supporting certificates of medical examinations will hereinafter be referred to in this matter. (D.S. with date c.m.e.)

April 27, 1970, see Ap; July 7, 1970, see Ap; December 22, 1970, see Ap; November 2, 1971, see Ap; January 30, 1973, see Ap; July 12, 1973, see Ap; March 27, 1975, see Ap; September 25, 1975, see Ap; and February 9, 1976, see Ap). Of the ten commitments, three were for indefinite commitments (D.S. dated November 2, 1971, see Ap; September 25, 1975, see Ap; and February 9, 1976, see Ap). During each of the ten hearings, Appellant was provided with counsel, informed of the nature of each hearing, given an opportunity to cross examine witnesses, given access to a jury trial and on two occasions had jury trials; and was examined each time by two doctors who certified that Appellant was schizophrenic and in need of hospitalization.[2] On several occasions, attempts to provide Appellant with outpatient therapy were tried but resulted in failure because Appellant refused to cooperate by not keeping appointments with the clinic (D.S. July 2, 1969, see c.m.e.; December 22, 1970, see c.m.e.; November 2, 1971, see c.m.e.; and January 30, 1973, see c.m.e.). The medical examinations further revealed that Appellant had difficulty in controlling his hostile feelings and was believed to be potentially dangerous to himself and others (D.S. April 24, 1970 see c.m.e.).

In January of 1976, Appellant had his eleventh, an indefinite commitment petition, filed against him. Appellant retained counsel and a trial to a jury was had (D.S. February 6, 1976, see Ap). At the conclusion of the evidence, the trial judge, over objection from Appellant (Appendix 8-9), instructed the jury that they were to find, if supported by clear, unequivocal and convincing evidence, that Appellant was

[2]Texas Mental Health Code, art. 5547-31 et seq; Art. 5547-40 et seq.

mentally ill and in need of hospitalization for the protection of himself and others (Appendix 12). The jury so found (Appendix 16) and Appellant was committed to the Austin State Hospital for an indefinite period of time (Appendix 17).

Appellant appealed the trial judge's instruction on the burden of proof to the Texas Court of Civil Appeals arguing that the proper burden of proof should be proof beyond a reasonable doubt. The Texas Court of Civil Appeals agreed with Appellant and overruled the trial court's instruction (Appendix 18). Appellee then appealed that decision to the Texas Supreme Court. The Texas Supreme Court in another case, *State v. Turner infra*, concerned with the same issue as here, ruled that the burden of proof for indefinite civil commitment hearings is by preponderance of the evidence (Appendix 21). The Texas Court of Civil Appeals' decision was thereby overruled and the trial court instruction upheld. From this ruling Appellant appeals to the United States Supreme Court (Appendix 24-25).

I.

INTRODUCTION

"Due process is flexible and calls for such procedural protections as the particular situation demands. . .(I)t is a recognition, (however), that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer* 408 U.S. 471, 33 L. Ed. 2d. 484, 494, 92 S. Ct. 2593 (1972). The "particular situation" here is indefinite civil commitment. The principal concern of the State at the commitment hearing is to provide, for an

unwilling individual, treatment and care for his mental disorder. Procedural safeguards most assuredly apply to this situation, but certainly not the same procedural safeguards afforded to one in a criminal prosecution where the primary concern of the State is to seek, for a Defendant, punishment for his criminal activity.

In *In re Gault*, 387 U.S. 1, 18 L. Ed. 2d 527, 548, 87 S. Ct. 1428 91967), the court, dealing with juvenile adjudication hearings, stated that "although the 14th Amendment does not require that the hearing at this stage conform with all the requirements of a criminal trial or even of the usual administrative proceedings, the due process clause does require application during the adjudicatory hearing of the essentials of due process and fair treatment". What the due process clause requires, therefore, in indefinite civil commitment hearings is not conformity "with all the requirements of a criminal trial "i.e., proof beyond a reasonable doubt standard, but essentials of due process and fair treatment.

In *Mathews v. Eldridge,* 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 898 (1976) where a State agency terminated benefits to a social security recipient, the Court set out the steps necessary to determine what process is due in any situation.

> That identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of any erroneous deprivation of such interest through the procedure used, and the probable values, if any, of additional or substitute procedural safeguards; and finally, the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *supra* 47 L. Ed. 2d at 33

Appellee argues that after such an analysis this Court will uphold the Texas Supreme Court's decision that proof by a preponderance of the evidence is the proper standard in indefinite civil commitment hearings in Texas and is not violative of due process.

II.

ARGUMENT

"The Private Interest Affected by Official Action." - Liberty

The result of any indefinite civil commitment hearing, like that of criminal prosecution or juvenile adjudication hearing, may be a loss of liberty. Because of this potential outcome, the Appellant seeks to persuade this court that proof by a preponderance of the evidence denies him due process. The loss of liberty in indefinite civil commitment proceedings is not as severe as the loss in criminal prosecutions because the "mental patient is entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others", *State v. Turner,* 556 S.W. 2d 563, 566. In the criminal prosecution the Defendant, although granted some privileges, e.g. in some cases probation or parole, is "entitled" to nothing if he is convicted.

The most analogous situation to the indefinite civil commitment hearings, where proof beyond a reasonable doubt is not imposed and where the United States Supreme Court has held that due process was not denied, is the revocation of parole or probation. In both instances the attendant consequences of loss of liberty and social

stigmatization are present. The "liberty" in jeopardy in revocation hearings is "conditional liberty properly dependent on observance of special parole [or probation] restriction". Burger Ch. J., in delivering the majority opinion in that case, went on to say "that the liberty of a parolee, although indeterminate, includes many of the core values[3] of unqualified liberty and its termination inflict a 'grievous loss' ", *Morrissey v. Brewer, supra* 33 L. Ed. 2d at 495.

The loss of liberty in indefinite civil commitment hearings is by analogy a "conditional" loss of liberty dependent on the mental progress of the patient. Once the patient is believed to be of such mental capacity that would, or circumstances are such that would, warrant release, he is released[4]. The Texas Mental Health Code has set out the procedure for release of a patient as follows:

Periodic Examination Required

The head of a mental hospital shall cause every patient

[3]"The liberty of a parolee enables him to do a wide range of things open to pesons who have never been convicted of any crime. . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life". *Morrissey v. Brewer, supra,* 33 L. Ed. 2d. at 494, 495.

[4]During the period from September 1, 1974, through August 31, 1975, there were 19,179 admissions to Texas mental hospitals, of which only 5,516 were return placements, meaning that they had been previously discharged by that facility with medical advice within three years of the present admission. During that period there were 21,308 discharges from mental health institutions, and 10,507 or 49.31% of all discharges were persons who had been involuntarily committed. Of all those discharged, 14,541 had been in the institution for a period of ninety days or less. Texas Department of Mental Health and Mental Retardation, Data Book 1975, 15-46.

to be examined as frequently as practicable, but not less than each six months. Mental Health Code Art. 5547-77

Discharge of Patients

a.) The head of a mental hospital may at any time discharge a patient if he determines after examination that the patient no longer requires hospitalization.

b.) The head of a mental hospital may at any time discharge a patient on furlough, and shall discharge a patient who has been on furlough status for a continuous period of eighteen (18) months.

d.) The head of a mental hospital may discharge a resident patient who has been absent without authority for a continuous period of eighteen (18) months.

e.) Upon the discharge of a patient, the head of the mental hospital shall prepare a Certificate of Discharge stating the basis therefore. The Certificate of Discharge shall be filed with the committing court, if any, and a copy thereof delivered or mailed to the patient. Mental Health Code Art. 5547-80 as amended in 1977.

The Court concluded in *Morrissey* that revocation of parole hearings do require due process and enumerated six (6) minimum requirements.[5] With regards to what burden

[5]We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation others by judicial decision usually on due process grounds. Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosing to the parolee of evidence against him; (c) opportunity to be heard in person and to

(continued)

must be carried, the Court, stated that "what is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior" *supra* at 496.

Appellant in his brief at page 7 listed a number of liberties at stake in criminal prosecutions and indefinite civil commitment proceedings. Indeed these same liberties are at stake in revocation hearings even though they are conditioned on additional rules which the ordinary citizen does not find mandated to him by a court. Yet the parolee may suffer a "grievous loss" of these same liberties, without the state shouldering a beyond a reasonable doubt standard, but instead just provide "some orderly process."

In *Gagnon v. Scarpelli,* 411 U.S. 778, 36 L. Ed. 2d. 656, 662, 661, 93 S. Ct. 1756, (1973), where the Court held that Petitioner was entitled to a preliminary hearing to determine if there was probable cause to believe Petitioner violated probation, and a final hearing to determine if probation should be revoked, but not entitled to a court appointed counsel in every case, Powell J. delivering the majority opinion, stated that "[p]robation, like parole revocation, is not a stage of a criminal prosecution but does result in a loss of liberty" and that the minimal requirement of due process must be afforded to the probationer. The Court did not

(footnote continued from preceding page)
present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate, this second stage of parole revocation to a criminal prosecution in any sense, *Morrissey v. Brewer supra* 33 L. Ed. 2d at 498, 499.

address itself to the burden of proof[6] in that case. However, it was held that proof beyond a reasonable doubt was not the standard, *Manning v. United States,* 161 F.2d 827 (1947); *United States v. Evers,* 534 F.2d. 1785 (5th Cir. 1976). An indefinite civil commitment hearing also is "not a stage of criminal prosecution but [may] result in a loss of liberty" and therefore should not have proof beyond a reasonable doubt imposed upon it.

Unquestionably, liberty is at stake but the United States Supreme Court has not always imposed the reasonable doubt burden of proof in all proceedings where the potential loss is present. The inference that can be drawn from this difference in requirement for burden of proof is that the United States Supreme Court holds some situations, where the loss of liberty occurs, not as severe as other situations. Since the due process clause does not require proof beyond a reasonable doubt where liberty is at stake, *United States Constitution Fourteenth Amendment;* and since the United States Supreme Court has held that the due process clause only requires a balancing of competing interests to determine what process is due, *In re Winship,* 397 U.S. 358, 91969) and since the Court, itself, has not imposed the reasonable doubt standard in all cases affecting liberty, the State as parens patriae and as protector if its citizenry, alone with guaranteeing minimum due process a set out in the Texas Mental Health Code, are ample justification for the Texas

[6]The burden of proof in a revocation hearing, in Texas is by the preponderance of the evidence. *Scamardo v. State,* 517 S.W. 2d 293 at 298 (1975). For the burden of proof on the federal level see *United States v. Garza,* (5 cir., 1973), 484 F.2d at 89, "All that is required is enough evidence, within a sound judicial discretion, to satisfy the district judge that the conduct of the probationer has not met the conditions of the probation".

Court's decision that the preponderance of the evidence is the proper standard in indefinite civil commitment hearings. This Court, therefore, should reject Appellant's argument that due process requires proof beyond a reasonable doubt in indefinite civil commitment hearings.

"The Governmental Interest" - Parens Patriae and Police Power

Appellant contends that indefinite civil commitment hearings are quasi criminal and that "civil labels and good intentions" are not enough to justify a denial of due process; with the latter Appellee agrees. However, one just has to look at the Texas Mental Health Code and see all the due process safeguards contained therein. Just as "civil labels and good intentions" in and of themselves, cannot justify a denial of due process neither do labels like quasi criminal, loss of liberty, and social stigmatization, in and of themselves, justify a constitutional imposition of proof beyond a reasonable doubt.

The problem in indefinite civil commitment hearings is trying to determine from present circumstances, future needs and future behavior with the aid of medical knowledge which is in a relataively undeveloped state, *Doremus v. Farrell,* 407 F. Supp. 509, 517 (1975); *Lynch v. Baxley,* 386 F. Supp. 378, 392 (1974). And, in addition making this determination within the rigid legal guidelines for an unwilling individual whose mental condition is more insidious than obvious, a condition which does not lend itself to the same certainty of proof as elements of a crime. Yet the individual, as well as society, needs help; and under our present system that is the responsibility of the State.

"Proof beyond a reasonable doubt is an inappropriate standard for use [here]. Predictions of dangerousness can hardly be beyond a reasonable doubt in the undeveloped framework of the science of psychiatric diagnosis and predictions, for the subjective determinations therein involved are incapable of meeting objective certainty" *In re Stephenson* 10 Ill. 507, 367 N. E. 2d 1273, 1277 (1977).[7]

Consequently, as the Texas Supreme Court stated "parens patriae . . . (and) . . . police power are valid, necessary state objectives which should not be thwarted by application of a too strict burden of proof". *State v. Turner supra* at 566. The more stringent requirement of beyond a reasonable doubt would work a hardship on the individual who has a right to treatment and to society which has a right to protection, *In re Beverly* 342 So. 2d 481, 488 (1977). "Mental illness is not a crime, and a person in need of mental treatment is not by reason thereof a criminal. But proof beyond a reasonable doubt is directly related to and associated with criminal trials and procedure, further exemplifying, . . . its inappropriateness here". *In re Stephenson supra* sat 1277.

In *Tippett v. Maryland* 436 F.2d. 1157 (1971), a case dealing with the Maryland Defective Delinquent Act, Petitioner argued that the Act offended due process because it required the state to prove by the preponderance of the evidence that a subject was a defective delinquent. The court in holding that preponderance of the evidence did not violate due process stated:

[7]The holding in *In re Stephenson supra* at 1278 is that the burden of proof for Illinois is clear and convincing. Although Appellee does not concur with that holding, it does concur with the argument against the standard of proof beyond a reasonable doubt in commitment hearings.

> In any event, in the present state of our knowledge choice of the standard of proof should be left to the State. A legislative [or Court] choice of the preponderance standard, the same standard governing civil commitment of mentally ill persons who have no history of criminality ought not to be held in violation of due process requirement when we have no firm foundation for an evaluation of the practical effects of the choice. *supra* at 1159

> The constitution does not require that the procedure under the Act be treated as if they were criminal proceedings subject to the self defeating strictures which the Constitution appropriately throws round the shoulders of Defendants facing criminal charges in adversary legal proceedings. *supra* at 1159.

The state interest is no slight interest to be summarily discarded when it is competing with individual liberty. The state is not seeking punishment but treatment.[8] Treatment with guidelines that more than just provide minimum due process requirements. The burden of proof does not represent the only measure of due process afforded an individual in the indefinite civil commitment hearing. The Texas Mental Health Code has provided much more. A sworn petition for indefinite commitment must be filed, Mental Health Code, Art. 5547-41 as amended 1977. "The

[8] "A high value has also been placed, however, on our society's obligation to protect and care for those of its members unable to protect or care for themselves. It is important to a concerned and humane society that *the margin of error be held to a minimum* in denying such protection and care. Moreover, the individual involved, as well as society, has a strong, interest in getting needed care or treatment which will enable him to function normally, and it seems to us that neither the interests of society nor the mentally ill are well served by a standard requiring proof so conclusive that many persons will be denied needed treatment, care and protection". *Ibid* at 1276, 1277 (emphasis added)

petition shall be accompanied by a Certificate of Medical Examination for Mental Illness by a physician who has examined the proposed patient within the . . . 15 days immediately preceeding the filing of the Petition", Art. 5547-42. (T)he county judge shall set a date for a hearing to be held within . . . 30 days of the filing of the Petition, and shall appoint an attorney ad litem to represent the proposed patient, Art. 5547-43. "At least . . . 7 days prior to the date of the hearing a copy of the Petition and Notice of Hearing shall be personally served on the proposed patient", Art. 5547-44 as amended 1977. "(T)he proposed patient shall not be denied the right to trial by jury. A jury shall determine the issues in the case if no waiver of jury trial is filed, or if jury trial is demanded by the proposed patient or his attorney at any time prior to the termination of the hearing, whether or not a waiver has been filed", Art. 5547-48. Proposed patient is afforded a Hearing on the Petition, Art. 5547-49. "No person shall be indefinitely commited to a mental hospital except upon the basis of competent medical or psychiatric testimony", Art. 5547-50. "The county judge within . . . 2 days after entering his order of Indefinite Commitment, may set aside his order and grant a new trial to the person ordered committed", Art. 5547-53. The Order of Indefinite Commitment is appealable, Art. 5547-54. To encumber parens patriae and police power with the reasonable doubt standard would hinder the process to the extent that the benefits it has to offer needy individuals may very well not be received.

"The Risk of any erroneous deprivation of such interest through the procedure used . . ." - Erroneous Commitment

The Texas Supreme Court's decision in *State v. Turner* *supra* at 566 requiring preponderance of the evidence as the

standard of proof in indefinite civil commitment hearings is not violative of due process of law in light of the decision in *In re Winship*. That case's contribution to the system of juvenile justice was that "factual error" must be minimized and that the burden of proof beyond a reasonable doubt is one way of accomplishing that end. It was the risk of conviction based on "factual error" that concerned the court. Particularly since the set of circumstances for adjudging one a delinquent or a criminal is identical. Past activity which had violated a carefully worded statute. It is the certainty of proving elements of a defined crime and the potential "factual error" which require the highest standard of proof, *Leo v. Twomey* 404 U.S. 477, 30 L. Ed. 2d 618, 626, 92 S. Ct. 619 (1972), not the attendant consequences of loss of liberty and the social stigma. As Harlan, J. stated in his concurring opinion in *In re Winship supra* at 375, "(t)oday's decision simply requires a juvenile court judge to be more confident in his belief that the youth did the act with which he has been charged". The underlying concept being that it is better to allow a guilty man or child to go free than to convict an innocent one because the only interest the state has is to punish for wrongdoing. Consequently, an erroneous conviction harms everyone.

On the other hand, the underlying concept in indefinite commitment proceedings is to provide treatment and care for those whose mental capacities are lacking and preventing them from willingly seeking the care and treatment they need. An erroneous commitment here is much less severe. "It is not unlikely that the mental health of a person erroneously committed will nevertheless be close to a point of serious illness and that such persons might well benefit from the treatment accorded them while committed". *In re Stephenson supra* at 1277. An additional consideration,

mentioned above, is that Texas provides for periodic review of a patient's status to determine if he no longer poses a danger to himself and/or the community.

There exist no mechanisms in the criminal or juvenile case designed to minimize "factual error" prior to a trial on the merits as do exist in the Texas Mental Code.[9] The Texas Mental Health Code seeks to do what the Court in *In re Winship* sought to do, that is, reduce the "factual error", not by relying solely on the burden of proof approach but by establishing a mechanism necessarily used before and after the indefinite civil commitment hearing. Once the indefinite civil commitment hearing becomes necessary the Texas Supreme Court mandated in *Turner* that the state must continue to comport with the "essentials of due process and fair treatment" and produce evidence to satisfy the factfinders of the need for commitment by a preponderance of the evidence.

Proof by a preponderance of the evidence does not increase the occurrence of erroneous commitments. 1. Texas Pattern Jury charges 37 (1969) provided that a jury be instructed that preponderance of the evidence means

---

[9]In Texas, a person becomes subject to temporary commitment to a mental hospital upon the application of any adult, supported by statements of two physicians that the person is mentally ill and required observation and/or treatment in a mental hospital. Notice and hearing are required, and a jury is available upon demand. Upon conclusion of the hearing, the person will be ordered confined to a mental hospital for up to ninety days if it is determined that he 1) is mentally ill, and 2) requires observation and/or treatment for his own welfare and protection or the protection of others. The court may refuse to order commitment, otherwise permissible, if he finds that required observation or treatment can be accomplished without commitment to a mental hospital. An order of temporary commitment is appealable to the Court of Civil Appeals. *State v. Turner supra* at 564.

"the greater weight and degree of credible testimony or evidence". The jury[10] is required to make two determinations, first that the testimony is believable and second the weight it must give to the testimony in reaching a decision. Indefinite civil commitment hearings are not conducted in a vacuum. The jury or judge is aware of what the outcomes are when a verdict is reached, the forced commitment to a state mental hospital and the social stigma connected with mental illness. This is no "abstract weighing of the evidence. . . without regard to its effect in convincing. . . (their) mind(s) of the truth of the proposition asserted", *In re Winship* 397 U.S. at 368 quoting *Dorsen & Rezneck, In re Gault* and the Future of Juvenile Law, I Family Law Quarterly, No. 4, at 26, 27 (1967). The Texas decision clearly recognizes the need for making the proper selection of the burden of proof[11] and has determined that an erroneous commitment is

[10]Probably the most valued element of due process is the jury, and Texas provides access to a jury both in temporary hospitalization and in indefinite civil commitment hearings (temporary hospitalization being necessary before the state can process to an indefinite civil commitment hearing). Certainly a jury would offer maximum protection from erroneous commitment.

"Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge." *Sioux City and Pacific R.R. Co. v. Stout*, 84 U.S. (17 Wall,) 657, 21 L. Ed. 745, 749 (1874).

[11]The imposition of proof beyond a reasonable doubt in indefinite civil commitment hearing carries with it the very real danger of creating an

(continued)

minimized just as effectively, if not more so, when the entire indefinite civil procedure is utilized, as it would be by the imposition of just proof beyond a reasonable doubt. The decision carries the added benefit of assuring that treatment and care will not be denied those where the state could not sustain the reasonable doubt standard.

Further, Appellant advances the argument that the conditions of mental hospitals are less than desirable. If such a situation exists, the remedy should properly be left to the legislature and no attempt should be made to remedy the situation by imposing a standard that could prevent those who need help from receiving it. A mental hospital should not be made a "euphemism for a prison" *In re Stephenson supra* at 1279.

(footnote continued from preceding page)

irreparable injury to the criminal system in Texas with regards to the defense of insanity. Texas presently provides two situations in which a defendant in a criminal trial can assert the defense of insanity: Insanity during the commission of the criminal act and insanity at the time of trial. The defendant, having the burden of proof in both cases, must establish his insanity by the preponderance of the evidence. If the burden of proof is raised to a higher standard in indefinite civil commitment hearings, a potential danger exists that the defendant will escape the ends of justice. The defendant is only required to prove his insanity by a preponderance of the evidence, if he succeeds then the state must come forth in an indefinite commitment hearing with proof beyond a reasonable doubt that he is mentally ill and in need of hospitalization. Should the state not be able to meet that burden the defendant will go free.

Texas Code of Criminal Procedure article 46.02 provides that proof by the preponderance of the evidence is necessary to establish insanity at the time of trial. The Code of Criminal procedure article 46.03, dealing with insanity at the commission of the crime, does not set out the burden of proof. But it is settle law in Texas that the burden is by preponderance of the evidence. *Burton v. State*, 471 S.W. 2d. 817 (Tex. Crm. App. 1971).

III.

CONCLUSION

What the Constitution requires is due process of law when the state seeks to infringe on individual rights. In certain situations, e.g., juvenile adjudication proceedings, the United States Supreme Court has required a constitutional imposition of proof beyond a reasonable doubt, *In re Winship,* because of the certainty with which a criminal act can be proven, *Leo v. Twomey.* The Supreme Court has never decided nor has the Constitution ever required this same burden of proof in indefinite civil commitment hearings. This being the case, it becomes the responsibility of the many States through their courts *Woodby v. Immigration Service,* 385 U.S. 276, 17 L. Ed. 2, 362, 87 S. Ct. 483 (1966) and/or legislature to determine what burden of proof is required, *Tippett v. State of Maryland.*

The Texas Supreme Court has held in *State v. Turner* that the burden of proof is by the preponderance of the evidence in indefinite civil commitment hearings. The burden of proof represents the risk of error that society will tolerate in conviction [or commitment situations], *Speiser v. Randall,* 357 U.S. 513 (1958). The proof by a preponderance of the evidence standard represents no greater risk of erroneous commitment in such hearings when that standard is taken as a part of the entire civil commitment proceedings. The Texas Supreme Court, therefore, has not deprived the Appellant of due process because it did not impose proof beyond a reasonable doubt in indefinite civil commitment hearings. To the contrary, the Texas Legislature, has afforded, in addition to the proof standard, additional safeguards designed to

allow the maximum protection of the individual interest, of the state interest and against erroneous confinement.

Respectfully submitted,

JAMES F. HURY, JR.
Criminal District Attorney
Galveston County, Texas